Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1996

JOHN DOE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Second Circuit correctly apply 18 U.S.C. §3742, rather than 28 U.S.C. §1291, in reviewing the extent of reduction of Mr. Doe's previously-imposed sentence pursuant to the Government's motion for reduction under Rule 35(b) of the Federal Rules of Criminal Procedure?

Should the Second Circuit have remanded this matter for further consideration of the Government's Rule 35(b) motion where the District Court's action in reducing Mr. Doe's sentence by only five years resulted in a violation of the cooperation agreement between Mr. Doe and the Government, because the District Court refused to give appropriate weight to third-party cooperation rendered through Mr. Doe?

Should the Second Circuit have remanded this matter for further consideration of the Government's Rule 35(b) motion where the reduction of the sentence of Mr. Doe of only five years resulted in a disproportionally high sentence for him, because his sentence was only four years less than that ultimately imposed upon his considerably more culpable, and less cooperative, co-defendant?

Should the Second Circuit have remanded this matter for further consideration of the Government's Rule 35(b) motion where the District Court committed errors of law and fact in deciding the appropriate reduction in Mr. Doe's sentence?

PARTIES TO THE PROCEEDING

The parties to this proceeding are John Doe and the United States of America. Although there were other defendants on the indictment, they were not parties in the Court of Appeals and have not been party to this proceeding.

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CITATION TO DECISION

The decision below is entitled *United States v. Doe*, ___ F.2d ___ (2d Cir. 1996).

JURISDICTIONAL STATEMENT

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1). The decision in the case was rendered on August 21, 1996 (Appendix "A", *infra*).

CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES TO BE INCLUDED

18 U.S.C. §3742; 28 U.S.C. §1291, Rule 35(b) of the Federal Rules of Criminal Procedure (Appendix "C", *infra*).

STATEMENT OF THE CASE

John Doe, along with several others, was indicted for cocaine-related offenses on December 21, 1991. On November 12, 1992, Mr. Doe pled guilty to one count of conspiracy to possess cocaine with intent to distribute, and was sentenced, under the guidelines, to a sentence of imprisonment of 16 years.

Mr. Doe had become involved in the enterprise herein because he was married to the sister of one of his co-defendants. This co-defendant was in the hierarchy of one of the Colombian drug organizations. Despite the family connections, Mr. Doe did not become involved in the criminal organization until his wife's substantial medical bills made the lure of large amounts of money too tempting for him to resist. He began as an "errand boy," but ultimately became more involved. Indeed, Mr. Doe admitted that he accepted the offer of employment knowingly, and ultimately became involved, for a short period, in the hierarchy of the criminal organization. His role was described in the pre-sentence report as follows:

> [John Doe] has been identified as the brother-in-law to defendant and leader of the New York operation of this organization .... He is also considered to be a supervisor in their hierarchically structured organization. Although

> considered a supervisor, [Doe] operated at the direction of [another person]. As a worker for [this other person], the defendant [Doe] was in charge of the distribution of cocaine to the Organization's Dominican customers.

Mr. Doe was arrested shortly after he began his role in the organization. His indictment, conviction, and sentence followed, as set forth above.

On October 18, 1993, the Government moved, pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure, for reduction of Mr. Doe's sentence, based upon his post-sentence cooperation, and anticipated continued cooperation, with the Federal Government regarding narcotics and other cases. It requested that the decision on that motion be deferred so that Mr. Doe could continue his cooperation. It was agreed that, because Mr. Doe and his co-defendants were incarcerated at the time of the agreement, and would remain incarcerated during the period of cooperation, they would be given credit, not only for their direct, personal cooperation, but for cooperation by any third parties whom they were able to persuade to come forward on their behalfs.

For the next two years, Mr. Doe provided significant cooperation, as documented by the Government, both personally and through third party intermediaries.

Personally, Mr. Doe cooperated in two investigations, which led to two indictments: *United States v. Catacoli* and *United States v. Megia*. In both of those cases, Mr. Doe's efforts resulted in guilty pleas by the defendants. In addition, Mr. Doe persuaded another informant to come forward and cooperate on Mr. Doe's behalf. This informant provided

information which led to important cases, and significant seizures of money and narcotics, not only in the New York metropolitan area, but across the country. Both the agents who worked with Mr. Doe and the United States Attorney ultimately stated that Mr. Doe's cooperation was of the highest value. They were satisfied that he did all that he could do in this vein.

After receiving some of the letters which detailed Mr. Doe's cooperation, and that of some of the other co-defendants in this case, the Court began to express personal reservations about the use of third-party cooperation in support of a Rule 35(b) motion. As to Mr. Doe, the Government stated that he had brought forward a person who otherwise would not have cooperated, and that the effort to bring him forward resulted in personal risk to Mr. Doe. Moreover, Mr. Doe's counsel pointed out that Mr. Doe, who was incarcerated during the entire period of his cooperation, could not have done any more than he did in bringing forward the information he had, and developing new information "by proxy,"

However, the Court continued to be bothered by the concept of third party cooperation. On December 8, 1995, the Court resentenced Richard Roe (a co-defendant) on the Government's Rule 35(b) motion regarding him. Mr. Roe was considerably more culpable than Mr. Doe, having originally been sentenced to 27 years imprisonment, 11 years more than Mr. Doe. In deciding that motion the Court first reduced Mr. Roe's sentence due to a retroactive reduction in the guidelines. The Court went on to note its distaste for third party cooperation, stating:

> Unfortunately, this is not a case in which I have much confidence in some to the people who have made representations on behalf of the United States, because the willingness to take third party cooperation, not in Mr. [Roe's] situation but in the case of some of the other co-defendants, is — I mean, for me to label it disturbing is to put it in the best possible light.

The Court further noted that it had grave misgivings about the quality of Mr. Roe's cooperation, stating:

> I have questions in my mind about how valuable this cooperation was. After all, you simply agreed to testify against the transportation wing of the [subject] organization group of people you were involved in. I have no reason to think that you broke any new ground, but I'll view this in the most positive light and accept the representation that it was significant. I'll also accept the fact that there was some benefit from third party cooperation. I still think that a significant sentence is warranted in your case.

The Court then proceeded to reduce Mr. Roe's sentence from 27 to 15 years.

At Mr. Doe's sentence, the Court heard counsel for both Mr. Doe and the Government talk about the sincerity and the fruitfulness of the efforts which Mr. Doe provided. In addition, the Federal Agents were available, in Court, to inform the Court about Mr. Doe's cooperation.

However, although conceding that Mr. Doe's cooperation was "substantial," the Court stated that it was concerned about Mr. Doe's original role in the operation. It stated:

> Mr. [Doe], the one thing I'd urge you to do is not kid yourself. Whether you liked it or didn't like it at the start, you ran the New York operation here.

In fact, as set forth above, Mr. Doe did not run the New York operation. Although Mr. Doe does not dispute that he had a supervisory role, the Court apparently overestimated the size of Mr. Doe's role in considering whether to reduce his sentence.

In addition, the Court continued to be concerned about and discuss its distaste for third-party cooperation. The Court stated:

> Before I sentence the defendant, let me say this to those who have taken advantage of the third party cooperation here. I recognize that it resulted in significant forfeitures, seizures and arrests. But what an impressive informant to be able to put all of this together, and how fortunate for him that I guess he basically got a walk for all of this, because I assume that nobody thinks I'm naive enough to think that he just started in drug trafficking when he came to you all to cooperate. And lo and behold, why is he not being used anymore? Because everybody suspects he's double dealing.

> Yesterday I sentenced a defendant who was convicted after trial. In his past, he had been a third party cooperator for somebody else, and you know what he did when he was a cooperating third party? He shot a cop. The Government's use of these third party cooperators, especially people like this, is fairly labeled, and as I've told the Government in the past, morally bankrupt. But I don't hold that against Mr. [Doe]. He did what he could do, and I seek to give him the benefit of that.

Thereafter, the Court reduced Mr. Doe's sentence from 16 years to 11 years.

Mr. Doe then requested reconsideration of the sentence. He pointed out that Mr. Roe had his sentence reduced from 27 years to 15 years. Mr. Roe had been far more culpable than Mr. Doe and, at his sentence, as quoted above, the Court had harbored grave doubts about how valuable his cooperation was. However, Mr. Roe's sentence was cut nearly in half. On the other hand, Mr. Doe, who was recognized to have been less culpable to begin with, in that his sentence was originally eleven years less than that of Roe, and whose cooperation was deemed to be the best and most truthful of the cooperators, received a much smaller reduction of his sentence. The Court declined to award any further reduction. It should further be noted that Mr. Roe provided virtually no first party cooperation, in contrast to Mr. Doe, whose first party cooperation was significant.

Mr. Doe appealed the results of the Rule 35(b) motion to the Second Circuit Court of Appeals. He contended that the

Circuit Court should review the District Court's decision to reduce his sentence only five years pursuant to the provisions of 28 U.S.C. §1291, rather than the more limited review available under 18 U.S.C. §3742. He further contended that the Lower Court made an error of law in refusing to reduce his sentence more than 5 years, because it violated the cooperation agreement by refusing to credit third-party cooperation appropriately. Mr. Doe further stated that the District Court made an error of fact in his sentence, because it erroneously believed that he "ran the New York organization." Finally, Mr. Doe contended that the decision on the motion regarding him and the motion regarding Mr. Roe resulted in a disproportion between Mr. Doe's sentences and that of his co-defendants, especially Mr. Roe.

The Second Circuit reviewed the case under 18 U.S.C. §3742, and dismissed the appeal.

REASONS FOR GRANTING THE WRIT

The major reason asserted by the petitioner for the granting of the writ is that there is a conflict between the First Circuit on the one hand, and the Second, Fourth, Ninth and Eleventh Circuits on the other hand, regarding whether an appeal from a motion under Rule 35(b) of the Federal Rules of Criminal Procedure is governed by 18 U.S.C. §3742 or by 28 U.S.C. §1291. The First Circuit has held that appellate review of the denial of a Rule 35(b) motion, or of a contention of inadequacy of the reduction of the sentence, is governed by the broader appellate jurisdiction found in 18 U.S.C. §1291. In this case, the Second Circuit explicitly disagreed, and found such review

to be governed by the more limited grounds set forth in 18 U.S.C. §3742, like the review of a sentence.

In *United States v. McAndrews*, 12 F.3d 273 (1st Cir. 1993), the First Circuit held that an appeal of a reduction of sentence under Rule 35(b) was an appeal from a challenge to a final order, governed by 18 U.S.C. §1291. It stated:

> By definition, a sentence must already have been imposed before Rule 35(b) can be invoked and a sentence reduction contemplated. It follows that the appealability of an order resolving a Rule 35(b) motion is not controlled by 18 U.S.C. §3742 because such on order is not, properly speaking, a sentence. [footnote omitted]. Rather, appealability in such circumstances, like appealability with respect to the disposition of virtually all other post-judgment motions, is governed by 28 U.S.C. §1291. 12 F.3d at 277.

In his appeal herein, Mr. Doe urged that the appeal be governed by 28 U.S.C. §1291, and that the Court review for abuse of discretion, as well as for violation of law, the adequacy of the reduction granted Mr. Doe. However, the Second Circuit held 18 U.S.C. §3742 to be applicable to the instant appeal, stating:

> Both positions are, in a literal sense, possible. We do not believe that the question of whether a reduction of a sentence under Rule 35(b) is a sentence or a judgment can be adequately resolved by analyzing its text in a vacuum. Our finding that §3742 applies to appeals of Rule

> 35(b) motions is predicated instead on the similarity between Rule 35(b) and §5K1.1 of the Sentencing Guidelines.
>
> This circuit has found that "[t]he only practical difference between Rule 35(b) and U.S.S.G. §5K1.1 is a matter of timing: [5K1.1] is based on substantial assistance before sentencing while [Rule 35(b)] is based on substantial assistance after sentencing." *United States v. Gangi*, 45 F.3d 28,30 (2d Cir. 1995) (citation omitted). It is settled in this circuit that appeals of §5K1.1 orders are governed by §3742. *See United States v. Lawal*, 17 F.3d 560, 562 (2d Cir. 1994). We have been given no reason why Rule 35(b) motions should be governed by a different standard. *United States v. Doe, supra.*

That very argument was rejected by the First Circuit in *United States v. McAndrews, supra.* It stated:

> The analogy [between Rule 35(b) and §5K1.1] has certain superficial attraction because both mechanisms operate to bring a defendant's sentence below the guideline sentencing range and entail similar judicial inquiries .... But on closer perscrutation, the analogy fails because it overlooks a jurisdictionally significant difference between downward departures and sentence reductions. *Id.* at 276.

Thus, at this point, the standard of review for a Rule 35(b) motion depends upon the Circuit in which the appear is heard.

The First Circuit will hear the appeal for abuse of discretion, as well as for statutory error of law; the Second Circuit review, as well as that in the Fourth, Ninth and Eleventh, will be much more circumscribed. This Court is the only Court which can resolve this issue.

It will be Mr. Doe's contention to this Court that appeals of the denial of Rule 35(b) motions should be governed by 28 U.S.C. §1291. When it enacted the guidelines, Congress also amended Rule 35(b) to eliminate the making, by defendants, of Rule 35(b) motions to reduce sentence. Under the new Rule 35(b), only the Government could move for reduction for post-sentencing cooperation. The obvious reason for this was to encourage post-sentence cooperation. In this amendment, Congress did not specifically make the provisions of 28 U.S.C. §3742 applicable to an appeal from those motions, which it clearly could have done. The Circuits which have applied §3742, reasoning by analogy, have curtailed the ability of defendants to appeal the results of the Government's Rule 35(b) motions without any specific Congressional warrant. Given the importance of the right to appeal, its curtailment should not be so casually allowed.

In addition, Mr. Doe will argue, on appeal, that under an appropriate review, the Second Circuit should have remanded the case for reconsideration of the motion because of an error of law. The District Court violated the agreement between the parties by its refusal to consider third-party cooperation appropriately, made a mistake of fact in sentencing Mr. Doe, and created a sentence which was disproportionately harsh in comparison with Mr. Doe's more culpable co-defendants. For those reasons, the sentence should have been set aside.

When the agreement was made between the Government and Mr. Doe, as well as between the Government and his co-defendants, it was explicitly agreed that third-party cooperation would be considered as a factor in the reduction of Mr. Doe's sentence. Mr. Doe, thereafter, cooperated directly and through an intermediary. His cooperation was extremely fruitful.

The cooperation agreement, as a plea agreement, is interpreted by this Court, and the Courts of Appeals, in the same manner that a contract is interpreted. *Santobello v. New York*, 404 U.S. 257, 262-263 (1971); *United States v. Salcido-Contreras*, 990 F.2d 51, 52 (2d Cir. 1993); *United States v. Rexach*, 896 F.2d 710, 713 (2d Cir. 1990) *cert. denied* 498 U.S. 969. Thus, a defendant who has fully performed his part in the agreement is entitled to have the promise inducing it fulfilled. *United States v. Carbone*, 739 F.2d 45 (2d Cir. 1984).

In this case, after Mr. Doe had fully performed his agreement, the promise which induced the cooperation was unfulfilled. Although the Government made a recommendation based upon Mr. Doe's third party and personal cooperation, the Court allowed its own distaste for third party cooperation to influence its reduction of Mr. Doe's sentence. Because the promise was not fulfilled, Mr. Doe is entitled to relief since the Court, as well as the Government, is obligated to give appropriate attention to the promise. In *United States v. Rueda*, 19 F.3d 3 (11th Cir. 1994), the District Court had granted the defendant only a five-week downward departure on the Government's Rule 35(b) motion, and refused to hold a hearing regarding the scope of the

defendant's cooperation. The Eleventh Circuit reversed, holding this to have denied the defendant the benefit of his plea agreement. See also *United States v. Yesil*, 991 F.2d 1527 (11th Cir. 1992).

Even though the District Court herein paid "lip service" to the concept that it was giving Mr. Doe credit for the cooperation provided, it is clear that the Court actually *punished* Mr. Doe unfairly for the actions of the informant, over which he clearly had no control. Mr. Doe cooperated whole-heartedly, and provided significant assistance to the Government, according to the Government's own statement. The Government pronounced itself completely satisfied. In addition, although the third-party informant eventually vanished, his prior cooperation was substantial. The reduction of only five years, to eleven years imprisonment, did not take adequate account of that cooperation, and was caused, in part, by the Court's refusal to appropriately credit the third party cooperation to Mr. Doe.

The Sentencing Court further apparently failed to reduce Mr. Doe's sentence sufficiently because it made a factual mistake about his participation in the underlying offense. The Court stated that Mr. Doe "ran the New York operation" for the organization of which he was charged with being a part. However, and as the Government will undoubtedly concede, this was an exaggeration of Mr. Doe's role. He did not run the New York operation. Although he was considered a supervisor, and was sentenced as one, he actually worked under the supervision of another of the defendants herein, and was only in charge of selling to the Dominican customers of the organization. Thus, there were many layers of culpability

greater than Mr. Doe's, up to the person who *actually* ran the New York operation and beyond. This was also recognized in the lesser original sentence of Mr. Doe in comparison with most of the other defendants in the "package plea" deal worked out. Where a sentence is based upon a mistake of fact, the defendant is entitled to a resentence. *United States v. Crooper*, 42 F.3d 755 (2d Cir. 1994); *United States v. Shonubi*, 998 F.2d 84 (2d Cir. 1993). Here, where the resentence was founded, in part, upon a significant mistake of fact, Mr. Doe should similarly be resentenced.

Finally, Mr. Doe's sentence should be reduced because a comparison between the sentence given to Mr. Roe, and the sentence given to Mr. Doe, demonstrates that Mr. Doe's sentence is disproportionately harsh.

Originally, the sentences in this case were meted out in a hierarchical arrangement, where the length of the sentence was a reflection of the relative culpability of the defendants. In this hierarchy, Mr. Roe was sentenced to 16 years.

At the time of Mr. Roe's sentence, the Court expressed reservations about the scope of Mr. Roe's cooperation, stating:

> I have questions in my mind about how valuable this cooperation was. After all, you simply agreed to testify against the transportation wing of the [criminal] organization group of people you were involved in. I have no reason to think that you broke any new ground, but I'll view this in the most positive light and accept the representation that it was significant. I'll also accept the fact that there was some benefit from third party

> cooperation. I still think that a significant sentence is warranted in your case.

However, in spite of this, Mr. Roe's sentence was reduced from 27 years to 15 years, a reduction of 44%.[1]

In contrast, the Court should have had no reservations about the value of Mr. Doe's cooperation. All of the cooperation resulted in new accusations and new indictments. However, the Court reduced Mr. Doe's sentence only 5 years, to eleven years, a reduction of only 31%. Thus, at this point, the remaining disparity between Mr. Roe's sentence and Mr. Doe's sentence is only 4 years.

While it is clear that a numerical analysis of years in jail is somewhat arbitrary, it is instructive to look at the sentences numerically in order to demonstrate the disproportionality. Thus, for example, Mr. Roe received a reduction in his sentence of nearly one-half, while Mr. Doe received a reduction in his sentence of less than one-third. In addition, when the sentences were originally pronounced, Mr. Doe's sentence was 59% of Mr. Roe's. As reduced, the sentence is now 73% of Mr. Roe's. Thus, although Mr. Doe was originally less culpable, and cooperated to considerably greater effect, he received a reduction which was proportionally much less than that of Mr. Roe, and is now compelled to serve

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[1] Part of the reduction was due to a retroactive change in the guidelines, which would bring Mr. Roe's maximum sentence down three years, to 24 years. However, this does not change the fact that the ultimate reduction in Mr. Roe's case was 12 years, while Mr. Doe received a 5 year reduction.

proportionally more time than Mr. Roe. This disparity should be corrected.

It should be noted that this case in not controlled by *United States v. Joyner*, 924 F.2d 454 (2d Cir. 1991). In that case, the Second Circuit found that disproportionality between co-defendants which was *caused* by guidelines calculations would not be an adequate basis for a downward departure, because this was a factor adequately taken into account by the guidelines. Here, the departure was already taken for reasons which the guidelines allow, and the disproportionality is a result of improper use of those factors. Therefore, it should be corrected by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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